

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

In re Subpoena to Non-Party
Michael Kohlsdorf,

in the matter of:

*In re LastPass Data Security Incident
Litigation*, 1:22-CV-12047-PBS

Case No. **25-mc-22239-BB**

[*Action Pending as Case No. 1:22-CV-
12047-PBS in the United States District
Court for the District of Massachusetts*]

**MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY
MICHAEL KOHLSDORF’S MOTION TO QUASH SUBPOENA**

Non-party Michael Kohlsdorf submits the following memorandum in support of his Motion to Quash the Subpoena (“Kohlsdorf Subpoena”)¹ issued to him by Plaintiffs.

INTRODUCTION

For the sixth time in three months, Plaintiffs attempt to circumvent party discovery by forcing a non-party to respond to a burdensome, premature subpoena. Through their non-party subpoenas, Plaintiffs requested scores of documents that they already requested from Defendant LastPass and demanded that certain non-party individuals—including Mr. Kohlsdorf—sit for depositions before the depositions of Defendant LastPass. The Court should not allow Plaintiffs to impose the undue burden of forcing Mr. Kohlsdorf, a non-party, to prepare and sit for a deposition before Plaintiffs obtain discovery from the actual party in this case.

In discovery, Plaintiffs issued eighty-nine Requests for Production to the sole defendant in this case: LastPass. But before LastPass completed its production in response to those eighty-nine Requests, Plaintiffs issued overly broad, duplicative subpoenas (“Non-Party Subpoenas”) to three

¹ A copy of the subpoena to Michael Kohlsdorf is attached as Exhibit A to the Declaration of Aaron D. Charfoos, filed concurrently herewith.

non-party entities, including GoTo Technologies USA, Inc. (“GoTo”), a company at which Mr. Kohlsdorf previously served in an interim role, and shortly thereafter issued a similar subpoena to a non-party individual, seeking documents and demanding that he sit for a deposition.² Plaintiffs and the Non-Party Subpoena recipients are still awaiting decisions on three separate pending Motions to Quash those Non-Party Subpoenas. *See* 1:25-mc-91069-PBS, ECF Nos. 1, 2 (D. Mass.); 1:25-cv-11316, ECF No. 1 (D. Mass.); 5:25-mc-00499, ECF No. 1 (W.D. Tex).

Further, on April 22, 2025, Plaintiffs filed a Motion for Leave to Amend Complaint to Add Related Entities as Defendants (“Motion to Amend”). ECF Nos. 184, 185.³ Plaintiffs ask that the Court allow them to re-add GoTo Technologies USA, Inc. (“GoTo”), an entity that the Court previously dismissed from the case, and to add Francisco Partners Management, L.P. (“FPM”) and Francisco Partners Consulting (“FPC”) as defendants in this case. It is additionally premature for Plaintiffs to seek Mr. Kohlsdorf’s deposition now, given that the potentially relevant scope of his deposition could change depending on the ruling on Plaintiffs’ Motion for Leave to Amend. ECF Nos. 184, 185.

Requiring Mr. Kohlsdorf to prepare and sit for a deposition before the *parties* have resolved their discovery disputes, before Plaintiffs have received LastPass’ complete production or taken depositions of LastPass representatives, and while the Motions to Quash and Plaintiffs’ Motion to Amend are pending is premature and unduly burdensome, and the subpoena to Mr. Kohlsdorf should be quashed.

² A copy of the subpoena issued to GoTo is attached as Exhibit B to the Declaration of Aaron D. Charfoos. Copies of the subpoenas issued to FPM and Elliott Management are attached as Exhibit C to the Declaration of Aaron D. Charfoos. A copy of the subpoena issued to Christopher Brian Nix is attached as Exhibit D to the Declaration of Aaron D. Charfoos. A copy of the subpoena issued to Michael Barry is attached as Exhibit E to the Declaration of Aaron D. Charfoos.

³ Citations to ECF docket numbers in this motion refer to the docket numbers in *In re LastPass Data Security Incident Litigation*, 1:22-CV-12047-PBS (D. Mass.).

FACTUAL BACKGROUND

A. The Data Breach Litigation and Non-Party Mr. Kohlsdorf

Plaintiffs’ claims against Defendant LastPass arise from a data breach suffered by LastPass in mid-2022. *See generally* ECF No. 86. Plaintiffs allege that the breach has led to the exposure, misappropriation, and misuse of many users’ information and caused injury to Plaintiffs and Class Members. *Id.* ¶ 2.

In their initial complaint, Plaintiffs asserted claims against both LastPass and GoTo. ECF No. 1, ¶¶ 5, 7-8. But on July 30, 2024, this Court dismissed all claims against GoTo, finding that “[n]o Plaintiff claimed to have ever transacted with GoTo, read its ‘terms of service,’ or relied on any of GoTo’s representations,” and “Plaintiffs [did] not plausibly allege GoTo caused them injury directly.” ECF No. 126, p. 16, § B.1 (Claims Against GoTo). Accordingly, LastPass is the only defendant in the case.

On April 22, 2025, Plaintiffs filed a Motion to Amend, seeking to re-add GoTo and to add FPC and FPM as defendants in this case. ECF Nos. 184, 185. Mr. Kohlsdorf previously served in an interim role at GoTo.

B. Discovery Between the Parties

In October 2024, Plaintiffs issued eighty-nine Requests for Production to LastPass. In January 2025, without waiting for LastPass to complete its production, or engaging with LastPass to resolve their objections to Plaintiffs’ Requests, Plaintiffs issued Non-Party Subpoenas to GoTo, FPM, and Elliott Investment Management, L.P. (“Elliott Management”), and in February 2025, issued a separate subpoena to an FPC employee, Christopher Brian Nix. In April 2025, Plaintiffs additionally issued a subpoena to an FPC employee, Michael Barry (collectively with Mr. Nix,

FPC, GoTo, FPM, and Elliott Management, the “Non-Parties”).⁴

Because the Non-Party Subpoenas sought documents that spanned a wide range of topics and contained requests that were either duplicative of the requests that Plaintiffs served on LastPass, or irrelevant to the claims in the Complaint (or both), and also demanded that both Mr. Nix and Mr. Barry sit for a deposition before any party depositions had been taken, and because Plaintiffs and the Non-Parties could not reach a reasonable agreement to defer the Non-Party Subpoenas until LastPass issued its complete production to Plaintiffs and party depositions were taken, the Non-Party entities jointly moved to quash the Non-Party Subpoenas (“Joint Motion to Quash Non-Party Subpoenas”), Mr. Nix filed his own Motion to Quash (“Nix Motion to Quash”) shortly thereafter, and Mr. Barry filed his own Motion to Quash in April 2025 (“Barry Motion to Quash”). All motions are still pending. 1:25-mc-91069-PBS (D. Mass.), ECF No.1; 1:25-cv-11316, ECF No. 1 (D. Mass.), ECF No. 1; 5:25-mc-00499, ECF No. 1 (W.D. Tex).

C. Plaintiffs’ Subpoena to Mr. Kohlsdorf

Plaintiffs issued a subpoena to Mr. Kohlsdorf on April 18, 2025, demanding that he sit for a deposition on May 8, 2025.⁵ Decl. of A. Charfoos, Exhibit A. Counsel for Mr. Kohlsdorf informed Plaintiffs’ counsel that they objected to the subpoena of Mr. Kohlsdorf and informed Plaintiffs’ counsel that they intended to file this Motion to Quash, as they had with the other non-party subpoenas. Decl. of A. Charfoos, ¶ 5. By seeking to immediately burden non-party Mr. Kohlsdorf with the need to prepare and sit for a deposition because Plaintiffs refuse to wait for and review the documents produced by LastPass and analyze the testimony offered by party deponents,

⁴ A copy of LastPass’ objections and responses to Plaintiffs’ first set of document requests is attached as Exhibit F to the Declaration of Aaron D. Charfoos.

⁵ Plaintiffs did not serve the Kohlsdorf subpoena, but on May 7, 2025, Plaintiffs’ counsel asked Mr. Kohlsdorf’s counsel to accept service of the subpoena. Decl. of A. Charfoos, ¶ 4. Mr. Kohlsdorf’s counsel accepted service of the subpoena on May 12, 2025. *Id.*

Plaintiffs seek to impose an undue burden on Mr. Kohlsdorf, and the Kohlsdorf Subpoena should be quashed.

ARGUMENT⁶

I. Legal Standard

Under Federal Rule of Civil Procedure 26(b)(2), a court must limit the frequency or extent of discovery if: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1). Fed. R. Civ. P. 26(b)(2). Non-party subpoenas issued pursuant to Rule 45 are subject to the constraints of Rule 26(b), including the relevance and proportionality requirements of Rule 26(b)(1). *See Solamere Cap. v. DiManno*, 621 F. Supp. 3d 152, 158 (D. Mass. 2022); *Smith v. Turbocombustor Tech., Inc.*, 338 F.R.D. 174, 176 (D. Mass. 2021).

When evaluating discovery issued to non-parties, courts closely scrutinize the burden of the discovery. *See United Therapeutics Corp. v. Watson Lab'ys, Inc.*, 200 F. Supp. 3d 272, 277 (D. Mass. 2016) (“When assessing burden, courts are generally more solicitous of non-parties.”). Courts in the First Circuit recognize that “concern for the unwanted burden of discovery thrust upon non-parties is a factor entitled to special weight” under the Rule 26 analysis. *See Cusumano*

⁶ Mr. Kohlsdorf incorporates by reference and joins all arguments made in the Joint Motion to Quash Non-Party Subpoenas to Francisco Partners Management, L.P., GoTo Technologies, Inc., and Elliott Management, and Memorandum of Law in Support thereof, the Motion to Quash Non-Party Subpoena to Christopher Brian Nix and Memorandum of Law in Support thereof, and the Motion to Quash Non-Party Subpoena to Michael Barry. *See* 1:25-mc-91069-PBS, ECF Nos. 1, 2 (D. Mass.); 1:25-cv-11316, ECF No. 1 (D. Mass.); 5:25-mc-00499, ECF No. 1 (W.D. Tex).

v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998); *see also Cascade Yarns, Inc. v. Knitting Fever, Inc.*, 755 F.3d 55, 59 (1st Cir. 2014); *Solamere Cap.*, 621 F. Supp. 3d at 158.

The district court's duty to prevent undue burden to subpoena recipients is further reflected in Federal Rule of Civil Procedure 45, which requires the court to "quash or modify a subpoena" that "subjects a person to undue burden." Fed. R. Civ. P. 45(d). Courts routinely grant motions to quash under these principles in order to protect non-parties like Mr. Kohlsdorf, and the Court should do the same here. *See, e.g., United Therapeutics Corp.*, 200 F. Supp. 3d at 280 (denying motion to compel non-party discovery where burden of compliance by non-party outweighed relevance of information sought); *see also Ponder v. Ocwen Loan Servicing, LLC*, 2019 WL 2249675, at *2 (D. Mass May 24, 2019).

II. Plaintiffs' Subpoena to Depose Mr. Kohlsdorf Is Premature and Burdensome.

Plaintiffs' subpoena demands that Mr. Kohlsdorf prepare and sit for a deposition before Plaintiffs complete depositions of Defendant LastPass. Such discovery is premature and unduly burdensome at this stage of the litigation. This Court has the power to limit discovery, and in doing so, is "require[ed] to balance the inquirer's right to know against the responder's right to be free from unwarranted intrusions." *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 187 (1st Cir. 1989). This is particularly important where, as here, one party wants to thrust the unwanted burden of discovery on a non-party. *See Cusumano*, 162 F.3d at 717 (explaining that "concern for the unwanted burden of discovery thrust upon non-parties is a factor entitled to special weight"); *see also United Therapeutics Corp.*, 200 F. Supp. 3d 272, 277 (D. Mass. 2016).

Mr. Kohlsdorf is not, and has never been, an employee of LastPass. He only briefly served in an interim role at GoTo, which the court has already dismissed from this case. Accordingly, Plaintiffs should take the depositions of Defendant LastPass' representatives, analyze their

testimony, and then determine if there is relevant, non-duplicative information that Mr. Kohlsdorf can provide. Doing so would ensure that any burden on Mr. Kohlsdorf—if a deposition is ultimately deemed necessary—would be limited, as party depositions would likely narrow any issues about which Mr. Kohlsdorf would be questioned. At that point, if Plaintiffs ultimately determine that there is relevant, non-duplicative information that Mr. Kohlsdorf can provide, Plaintiffs may issue a narrowly tailored subpoena for testimony that Plaintiffs in good faith believe Mr. Kohlsdorf will offer that cannot be obtained through less burdensome means. This process would ensure that any burden on Mr. Kohlsdorf—if a deposition is ultimately deemed necessary—would be limited, as party depositions would likely narrow any issues about which Mr. Kohlsdorf would be questioned.⁷

CONCLUSION

For the reasons set forth above, non-party Michael Kohlsdorf respectfully requests that this Court grant his Motion to Quash and grant such further relief as the Court deems proper.

LOCAL RULE 7.1(a) CERTIFICATE

Pursuant to Local Rule 7.1(a), undersigned counsel hereby certifies that counsel for the parties have conferred in a good-faith attempt to resolve this matter by agreement and certifies that no agreement could be made. Accordingly, Mr. Kohlsdorf filed this Motion to Quash.

⁷ At a minimum, Plaintiffs should wait for the Court's ruling on their Motion to Amend. If GoTo, FPM, or FPC are added as a defendant in the case, Mr. Kohlsdorf's counsel will confer with Plaintiffs' counsel regarding the request for his deposition.

Dated: May 16, 2025

Respectfully submitted,

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By: /s/ Robert Ames Gordon

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed using the CM/ECF system on May 16, 2025 and served on all counsel or parties of record on the Service List below via email.

By: /s/ Robert Ames Gordon

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